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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

Jose Luis Moreno, Petitioner,

v.

United States of America, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit's definition of the "necessity" requirement under the federal wiretap statute conflicts with previous decisions by this Court and the United States Court of Appeals for the District of Columbia?

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IN THE SUPREME COURT
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JOSE LUIS MORENO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jose Luis Moreno respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioner's conviction (App., infra, 1a-5a) is not designated for publication. The opinion of the Court of Appeals denying petitioners' request for a rehearing and rehearing en banc (App., infra, 6a) is not designated for publication.

JURISDICTION

The Court of Appeals entered its final judgment on July 22, 2002. (App., infra, 6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AT ISSUE IN THE CASE

18 U.S.C. § 2518, subdivision (1) provides:

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be omitted, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communications is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probably cause to believe

that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

STATEMENT OF THE CASE

A. Proceedings Below

On October 16, 1998, the grand jury returned an indictment against Jose L. Salazar, Jose Luis Moreno and Sotero Orona Guzman charging each in Count One with Conspiracy to Possess with Intent to Distribute and to Distribute Cocaine and Marijuana in violation of 21 U.S.C. §§ 841, subdivision (a)(1) and 846. In Count Two, the grand jury charged Guzman with Possession with Intent to Distribute 39.7 kilograms of Cocaine in violation of 21 U.S.C. §841, subdivision (a)(1) and, Salazar and Moreno with aiding and abetting this crime in violation of 18 U.S.C. § 2, subdivision (a). In Count Three, the grand jury charged Salazar and Moreno with Possession with Intent to Distribute 107.6 kilograms of Cocaine in violation of 21 U.S.C. § 841, subdivision (a)(1), and in Count Four with Possession with Intent to Distribute 6.8 kilograms of Marijuana in violation of 21 U.S.C. § 841, subdivision (a)(1).

On November 16, 1998, Moreno filed a motion to suppress wiretap evidence. On November 23, 1998, Moreno filed a motion to suppress evidence seized at residences located at Herrick Street and Glenoaks Boulevard pursuant to search warrant.

On January 4, 1999, the District Court denied the motion to suppress the wiretap evidence and the evidence seized at the Herrick Street residence, but reserved ruling as to the Glenoaks location.

On January 25, 1999, the government announced its intentions to move to dismiss the indictment against Guzman because they had doubts that Deputy Art Barrera of the Los Angeles Sheriff's Department was telling the truth about the stop and search of Guzman's vehicle. On the same day, the District Court granted the government's motion to dismiss the charges against Guzman. On February 11, 1999, the government stated that it would not use the 40 kilograms of cocaine from Guzman's car against Moreno or Salazar.

On February 1, 1999, Moreno filed a motion to dismiss the indictment based upon government misconduct. On February 11, 1999, the District Court reconsidered its previous ruling denying the suppression of evidence found in the Herrick location in light of Barrera's untruthfulness and the illegal search of Guzman's vehicle. Yet, even if the District Court excised from declaration in support of the search warrant the observations about and the seizure of the 40 kilograms of cocaine from Guzman's vehicle, there would still be probable cause to search the Herrick Street residence. The District Court noted that there was probably no need to excise the fact that 40 kilograms of cocaine were found because it was a true fact.

On February 16-17, 1999, the District Court heard testimony from witnesses regarding the motions to suppress and the motion to dismiss. The District Court ruled that the defendants could not call Deputy Barrera,

his partner Deputy Cervantes, and his supervisor Deputy Gleeson as witnesses in this case. On February 26, 1999, the District Court denied the motion to suppress evidence seized at the Herrick Street residence and the motion to dismiss the indictment.

On March 15, 1999, the District Court denied the motion to suppress the evidence seized at the Glenoaks residence. On the same date, Moreno pled guilty to Counts One and Three of the redacted indictment. On April 9, 1999, the District Court filed its findings of fact and conclusions of law regarding each of the motions heard in this case.

On March 5, 2001, the District Court found Moreno's Offense Level was a 36 based upon the 107.6 kilograms of cocaine found in the Herrick Street residence. The District Court rejected the government's request for a gun enhancement. The District Court increased Moreno's offense level by two levels for his managerial role in the offense, rejecting the government's contention that the increase should have been three levels. The District Court found a two level enhancement applied because less than five people participated in the cocaine conspiracy. Moreno's offense level was reduced three levels for acceptance of responsibilty giving him a total offense level of 35. The District Court rejected his motion for a downward departure for aberrant behavior.

With a Criminal History Category of I, Moreno's sentencing range was 168-210 months. The District Court imposed a 168 month sentence for each count and ordered that the sentences for each count be served concurrently.

Moreno filed a timely notice of appeal. On June 5, 2002, the United States Court of Appeals for the Ninth Circuit affirmed Moreno's convictions.

Moreno filed a timely petition for rehearing and/or rehearing en banc. On July 22, 2002, the Ninth Circuit denied his petition. Moreno now files a timely petition for writ of certiorari.

B. Statement of Facts

In early July, 1998, during a separate narcotics investigation, Drug Enforcement Agents ("DEA") intercepted telephone calls from a telephone number with Jose Moreno listed as a subscriber. On August 25, 1998, Special Agent Renee Babic obtained a court order for a pin register for this telephone number. Thereafter, she filed an affidavit in support of an application for an order authorizing wire interception of this same telephone. On September 14, 1998, the order was signed, and DEA agents began monitoring and recording Moreno's telephone conversations. The government used these conversations as the basis of their case against Moreno.

On September 22, 1998, Deputy Harry Smith of the Los Angeles Sheriff's Department observed a White Chevrolet Astro Van in the area of Garfield and the 60 Freeway. On September 29, 1998, Smith saw three people get into this same van at a taxidermy shop in North Hollywood, California. He followed the van to the China King restaurant on Sunland Avenue. The same three persons exited the van and went inside the restaurant. When they exited, they were with a fourth person who drove off in another vehicle.

Smith identified Moreno as one of the persons in the van. As he exited the restaurant, Smith saw Moreno using a cellular telephone. At the same time, the wire room intercepted a call from "Chombi", who the government claimed was Moreno, to "Peter", who the government claimed was Salazar.

Smith also identified Salazar as one of the persons who entered the van at the taxidermy shop, but could not positively say Salazar was the driver of the van. The van then left the restaurant and went to the Glenoaks residence.

On September 30, 1998, Gregory Thurman of the Los Angeles Sheriff's Department observed two persons place

a package inside a Volkswagen Golf at the Herrick Street residence. As the Golf left the Herrick Street residence, Deputy Robert Molina observed the Golf travelling at a high rate of speed which he paced at 85 mph. He contacted sheriff's dispatch and requested a marked police unit to do a traffic stop of the Golf. Molina instructed dispatch that the police unit must develop its own probable cause to justify the stop. He did not tell them to stop the Golf based upon his observations. If the police unit did not observe any vehicle code violations, Molina told dispatch that they should wait for the Golf to stop on its own and make consensual contact with the driver.

Molina followed the Golf to a liquor store. The driver, Sotero Guzman, exited the vehicle and entered the store. Deputy Art Barrera of the Los Angeles Sheriff's Department drove into the parking lot after Molina and Guzman arrived, and Barrera came over to Molina's car. Molina informed Barrera that Guzman was the man he was following because Barrera did not observe Guzman prior to this time.

After Thurman had arrived at the liquor store parking lot, he informed another marked police unit at the scene that the police units had to develop their own probable cause to stop. He never instructed anyone to stop the car without probable cause.

On October 1, 1998, Officer Bret Lively observed the same Astro van at a Motel 6 in Sylmar, California. The van left the motel and went to a bank of pay telephones. Salazar exited the van and made what appeared to be a few telephone calls. Lively saw this same van again at a Circuit City in Burbank, California later that evening when they arrested Salazar and Moreno. Also during the evening hours, DEA agents entered the Glenoaks residence without a warrant and observed some guns inside the residence.

In his declaration prepared for the suppression hearing in this matter, Barrera claimed under penalty of perjury that he observed Guzman travelling at 80 mph and weaving in and out of traffic. He followed the Golf to a liquor store parking lot, saw Guzman exit his vehicle and walk into the liquor store. Yet, a transcript of the radio transmissions between Barrera and the other officers does not mention Guzman's car speeding or weaving.

Agent Babic prepared an affidavit in support of search warrant for the Herrick Street residence. Babic based her affidavits upon the intercepted telephone calls from Moreno's telephone, the search of Guzman's Golf, the warrantless searches of the Glenoaks residence, surveillance of police officers and agents, and her opinions to establish probable cause to search these residences.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT MORENO'S PETITION BECAUSE THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Pursuant to Supreme Court Rule 10, subdivisions (a) and (c), this Court may review a matter on a writ of certiorari if a United States Court of Appeals has decided an important federal question which conflicts with relevant decisions of this Court or of other federal circuits. In this case, the Ninth Circuit Court of Appeals has defined the "necessity" requirement of the federal wiretap statute which conflicts with numerous holdings by this Court, the United States Court of Appeals for the District of Columbia, and interestingly, its own circuit. As a result, this Court should grant review Moreno's matter on a writ

of certiorari, reverse the Ninth Circuit's decision to affirm the District Court's ruling not to suppress evidence obtained against Moreno via wiretap, and remand this case to the District Court for further proceedings.

18 U.S.C. § 2518, subdivision (1) provides:

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be omitted, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communications is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probably cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et. seq. (the "Act") governs the use of governmental electronic surveillance. The Act attempts to balance the need for electronic surveillance against the obvious dangers and intrusions inherent in electronic surveillance.

With this balance in mind, the government may utilize electronic surveillance when necessary to ferret out serious crime only when assurances have been made that citizens are not subjected to unreasonable and unnecessary intrusions into their privacy. United States v. Giordano, 416 U.S. 505, 526-527 (1974). Electronic interception of private conversation may be conducted only after court

authorization based upon government compliance with stringent predicate requirements.

When making this determination, courts must take into account important policy considerations that underscore the critical balance between effective law enforcement and the restraint necessary to protect the public in the context of wiretap interception. See, United States v. Kalustian, 529 F.2d 585, 588 (9th Cir. 1976). Central to this restraint is the government's burden to meet the "exhaustion" or "necessity" requirement of 18 U.S.C. 2518, subdivision (1)(c), which requires applications for intercept orders to contain "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." This necessity requirement means that the affidavit must set forth a factual background that shows the ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case. United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986).

The statutory standard is to be strictly applied. A district court must reject a wiretap application if law enforcement officers have not first attempted, without success, traditional investigative methods that "easily suggest themselves and are potentially productive and not unduly dangerous." United States v. Ippolito, 774 F.2d 1482, 1486 ((9th Cir. 1985).

The necessity requirement of 18 U.S.C. § 2518, subdivision (1) (c), exists to limit the use of wiretaps because they are highly intrusive and to assure that wiretapping is not resorted to in situations where "traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153, n. 12 (1974); United States v. Giordano, 416 U.S. 515; United States v. Bailey, 607 F.2d 237, 241 (9th Cir. 1979), cert. denied, 455 U.S. 934 (1980); United States v. Smith, 519 F.2d 516, 518 (9th Cir. 1975).

Because necessity is the keystone of congressional regulation of electronic eavesdropping, courts have been given substantial power to closely scrutinize applications challenged for non-compliance. United States v. Kalustian, 529 F.2d at 589-99. This scrutiny has been recognized by this Court as an essential component of judicial review of government conduct. Dalia v. United States, 441 U.S. 238 (1979). Where the government fails to comply with its duty to demonstrate necessity, suppression of wiretap evidence is the appropriate remedy, as provided for under the statue. See, 18 U.S.C. § 2515; United States v. Giordano, 416 U.S. at 527.

The necessity for the wiretap must be readily apparent from the affidavit. United States v. Martinez, 588 F.2d 1227, 1231 (9th Cir. 1978); see also, United States v. Ippolito, 774 F.2d at 1485. Moreover, necessity must be established with factual specificity. The government's affidavit in support of the wiretap order must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand. United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977). See also, United States v. Ippolito, 774 F.2d at 1486 ("Such a showing must allege specific circumstances that render normal investigative techniques particularly ineffective, or the application must be denied").

In order to show necessity, the government must overcome the statutory presumption against granting a wiretap application. Id. The presumption can not be overcome by conclusory, boiler-plate, or generic statements in the wiretap affidavit composed solely of conclusions unsupported by particular facts which give no basis for a determination of compliance under the federal wiretap statute. United States v. Spagnuolo, 549 F.2d at 710.

The policy supporting the necessity standard clearly militates against the government's use of boilerplate or generic language in the wiretap affidavit. Boilerplate assertions that the necessity standard is met based on an agent's knowledge and experience will not suffice. United States v. Spagnuolo, 549 F.2nd at 710. The reason for requiring specificity is to prevent the government from making general allegations about classes of cases thereby sidestepping the requirement that there be necessity in the particular investigation in which wiretap is sought. United States v. Ippolito, 774 F.2d at 1486.

On this point, the District of Columbia Circuit has observed that "we must be careful not to permit the government merely to characterize a case as a "drug conspiracy"... that is therefore inherently difficult to investigate. The affidavit must show with specificity why in this particular investigation ordinary means of investigation will fail." United States v. Robinson, 698 F.2d 448, 453 (D.C.Cir. 1983) (per curiam) [emphasis in original]; also quoted in United States v. Simpson, 813 F.2d 1462, 1471 (9th Cir. 1987).

The government may meet the specificity requirement "in various ways, including, but not limited to, descriptions of the particular illicit operation's peculiarities which necessitate a wiretap and of the heretofore unsuccessful investigatory efforts of the police." United States v. Spagnuolo, 549 F.2d at 710. Focusing on this specificity requirement, the District Court in United States vs. Ailemen, 986 F.Supp. 1228 (N.D. Cal. 1997), granted a motion to suppress wiretap evidence by finding, among other things, that the wiretap affidavit relied far too much on boilerplate, generic language. Citing United States v. Ippolito, 774 F.2d at 1486, the District Court observed that "[such generic language is far from specific about the inability of traditional methods to uncover specific information."

A showing of necessity is required for each telephone and each member of a conspiracy, and that the government cannot simply use its necessity argument as to one conspirator to justify a wiretap against another conspirator. In United States v. Carneiro, 861 F.2d 1171 (9th Cir. 1988), the court suppressed wiretap evidence and was highly critical of the government's failure to comply with its statutory mandate. Citing the earlier opinions in United States vs. Brone, 792 F.2d 1506, United States v. Santora, 600 F.2d 1317 (9th Cir. 1979), and United States v. Abascal, 564 F.2d 821 (9th Cir. 1977) cert. denied, 435 U.S. 953 (1978), the court made the following observations which highlight the strict standard by which the government must establish necessity as to each individual target of the wiretap, regardless of whether there are many members of the same conspiracy:

The DEA failed to conduct an investigation of Harty prior to applying for authority to tap his telephone. Instead, it appears that the DEA sought the wiretap simply because Harty was believed to be a member of the conspiracy under investigation. A suspicion that a person is a member of a conspiracy, however, is not a sufficient reason to obtain a wiretap.

United States v. Carneiro, 861 F.2d at 1180; see also, United States v. Abascal, 564 F.2d at 826 (the government may not dispense with the necessity showing with regard to one conspirator simply because it has proved necessity in the case of another); United States v. Santora, 600 F.2d at 1321. Rather, the government must satisfy the necessity requirement every time it seeks a wiretap. United States v. Abascal, 564 F.2d at 826 (government must show that each wiretap separately satisfies the necessity requirement). Moreover, "there must be a showing of necessity with respect to each telephone and conspirator." United States v. Carniero, 861 F.2d at 1181.

"It is not enough that the agents believe the telephone subscribers they wish to tap are all part of the conspiracy. Less intrusive investigative procedures may succeed with one putative participant while they may not succeed with another." Thus, the fact that the government may have obtained wiretap authorization against one or more members of a conspiracy does not permit the government to dispense with the required showing when applying to tap the telephones of other conspirators. United States v. Santora, 600 F.2d at 1320.

In Santora, the court held that although the government's first affidavit was sufficient to support the initial intercept order for the interception of one targeted telephone, it was insufficient to support authority to tap telephones of other suspected conspirators. The court observed that the law is clear that each wiretap application must individually satisfy the necessity requirement. Id. at 1321. In support of its decision to suppress evidence obtained via wiretap, the court found "[t]he affidavit in support of the order failed to recite that any specific efforts had been made by federal agents to investigate the activities of those person whose telephones were to be tapped to discover each of those individuals' complicity in the offenses." Id.

Agent Babic's affidavit in support of the wiretap order issued in this case is a "textbook" example of an improper wiretap affidavit that failed to show necessity for the wiretap order. First and foremost, Babic primarily relied upon information used to obtain wiretap authorization for another telephone to convince a court to issue a wiretap authorization for Moreno's telephone. Although the government's first affidavit was sufficient to support the initial intercept order for the interception of one targeted telephone, i.e., Target Telephone #2, it was insufficient to support authority to support an order to conduct wiretap surveillance of Moreno's telephone.

The government had information that Target Telephone #2 received calls from Moreno's cellular telephone in early July 1998, indicating the person using this telephone may be a supplier of narcotics. The telephone calls intercepted from Target Telephone #2 made by Moreno's telephone contained conversations which Babic interpreted to be coded language about a narcotics deal.

Yet, during the seven week period between the time the actual telephone calls were intercepted until the pin register order was obtained, the government made no efforts to obtain information to corroborate their contentions. Agents did not undertake any surveillance to determine whether the subscriber of Target Telephone #2 met with anyone not previously identified at or near the time of the telephone calls as a follow-up or to consummate the purported narcotics deal discussed over the telephone. In addition, agents failed to obtain DMV photographs and addresses of persons named Jose Moreno, and use this information to set up surveillance to uncover other suspicious activities.

After a seven week period without any follow-up investigation, Babic obtained an order for pin register information on Moreno's telephone. With this order, Babic and the DEA were able to gather an abundance of information about the telephone calls made by and to Moreno's cellular telephone.

Once again, Babic and the other agents on the case sat on this information and did nothing in terms of follow-up investigation. Rather, she relied on information obtained in another investigation about other persons purported to be involved in narcotics transactions to the show the person using Moreno's telephone was also involved with narcotics activity.

Babic claimed in her affidavit that the pin register information showed that Moreno or the individual using the telephone made numerous, repeated telephone calls to certain pagers, which according to Babic, is indicia of narcotics activity. The Moreno telephone also was used to call five different telephone numbers of persons that Babic believed, from information obtained in other investigations, to have some connection to narcotics. Babic had subscriber names and addresses for four of these telephone numbers.

Yet without any explanation, Babic again failed to use this information to conduct surveillance of these addresses or other follow-up investigation to corroborate her beliefs. Rather, she immediately prepared an affidavit to obtain a wiretap order.

The haste in which Babic acted is further highlighted by the reasons and supporting facts set forth in her affidavit to show necessity for the wiretap order. Babic identified four confidential informants in the Aramburo investigation, the person associated with Target Telephone #2. Confidential Informant No. 1 did not know Aramburo or the other targets of that investigation and was not willing to testify or be identified. Confidential Informant No. 2 refused to testify or be identified. Confidential Informant No. 3 provided some useful information, the content of which was not disclosed, but was not completely cooperative. Confidential Informant No. 4 was not willing to testify or be identified because of safety concerns.

The above facts and reasoning are only relevant to whether a wiretap order should have been issued for Target Telephone #2. In other words, Babic has set forth reasons why an order should issue as to Target Telephone #2, but she has failed to specify why these confidential informants would not be helpful to obtain information about Moreno.

Nowhere in her application did Babic indicate that she asked any of these four informants about Moreno or whether they were familiar with Moreno's cellular telephone number. Regardless of whether three of these confidential informants did not want to testify or be identified, they may have possessed information about Moreno which they could have provided without having to testify or be identified, but this Court will never know because Babic simply failed or refused to ask them simple questions about Moreno, his telephone number or the telephone numbers associated with his cellular telephone obtained from the pin register.

Babic opined that no undercover agents could be utilized in this case, and even if one could be used to penetrate this organization, she did not believe that the goals of the investigation could be achieved using this investigative technique. Unfortunately, Babic did not set forth any specific reasons about the uniqueness of this particular organization that precluded the use of undercover officers. Certainly, Babic and the DEA had Spanish speaking agents and officers working for or with them. Yet, again, the affidavit was void of any failed attempts made by Babic or the DEA to use an undercover agent. If Babic would have at least tried to use an undercover officer, the lack of success she or other agents encountered would have provided the reasons for the necessity to use wiretaps, which was lacking in her affidavit.

Instead, Babic relied on boilerplate language in her affidavit. As noted in the cases cited above, this boilerplate language is insufficient to show why the government needed to use a wiretap on the specific telephone used by Moreno in this case. Moreno was entitled to detailed facts and reasons why it was necessary for the government to tap his telephone in this case.

An analysis of Babic's affidavit shows the vicious circle of reasoning she relied upon to obtain a wiretap order in this case: the necessity for a wiretap in this case was built upon her and the other agents complete lack of effort to undertake any other investigative techniques, and vice versa. It is obvious from her actions that Babic believed she needed to act quickly in this case, but set forth no reasons why this was so. The affidavit's lack of detail, or for that matter any particular information, as to why it was necessary to use a wiretap on Moreno's telephone shows why the wiretap should never have been authorized in the first place.

Yet despite relevant decisions by this Court and the District of Columbia Circuit to the contrary, the Ninth Circuit in this case found that the necessity requirement may be met by using boilerplate language and evidence obtained from other wiretap orders, and ignored the lack of detail in the affidavit as to why it was necessary to use a wiretap on Moreno's telephone and pager. As a result, this Court should review Moreno's matter on a writ of certiorari, reverse the Ninth Circuit's decision to affirm the District Court's ruling not to suppress evidence obtained against Moreno via wiretap, and remand this case to the District Court for further proceedings.

II. IF THIS COURT GRANTS REVIEW, REVERSES THE NINTH CIRCUIT'S DECISION, AND SUPPRESSES THE WIRETAP EVIDENCE, THEN THIS COURT SHOULD ALSO REMAND THIS CASE DIRECTING THE NINTH CIRCUIT TO DECIDE WHETHER THERE WAS SUFFICIENT PROBABLE CAUSE TO SEARCH THE HERRICK LOCATION WITHOUT THE WIRETAP EVIDENCE.

In its opinion, the Ninth Circuit also found there was sufficient probable cause to search the Herrick location based in part upon the conversations overheard using the

wiretap on Moreno's telephone. Thus, if this Court finds the wiretap evidence should have been suppressed, as petitioner is arguing in Section I of this petition, then this Court should also remand this case to the Ninth Circuit ordering the panel to determine whether the affidavit in support of the search warrant contained sufficient probable cause to search the Herrick location after excising from the search warrant affidavit the illegally obtained wiretap evidence.

A federal search warrant must be based upon a showing of probable cause that a federal crime has been committed. See, Fed.R.Crim.P. 41(b)(2). This Court has stated that a search warrant may lawfully issue when there is a probable cause to believe "that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Determinations of probable cause must be upheld if the issuing magistrate had a "substantial basis" for concluding that a search would uncover evidence of wrongdoing. Id. at 236. Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home unless agents can also establish reasonable cause to believe that evidence of a crime will also be found in the place to be searched. United States vs. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991).

Evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search. United States vs. Wanless, 882 F.2d 1459 (9th Cir. 1989). "It is now fundamental that evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search." United States v. Wanless, supra at 1465, citing, United States v. Vasey, 834 F.2d 782, 788 (9th Cir. 1987), United States v. Roberts, 747 F.2d 537, 541 (9th Cir. 1984); see also, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

However, the mere inclusion of tainted evidence in an affidavit does not, by itself, taint the entire warrant or evidence seized pursuant to the warrant. United States v. Driver, 776 F.2d 807 (9th Cir. 1985). A reviewing court should excise the tainted evidence and determine whether the remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant. United States v. Vasey, 834 F.2d at 788.

In the case at bar, any reference to the seizure of the approximately 40 kilograms of cocaine from Guzman's Gulf in the search warrant affidavit must be totally excised from the warrant because, by the government's own admission, it was illegally obtained and would not be used against Moreno in this case. The reference to the guns found at the Glenoaks residence also should be excised because it also was the product of an illegal, warrantless search. As the District Court held, the exigent circumstances exception to the Fourth Amendment warrant requirement did not apply to the entry into the Glenoaks residence before a search warrant was obtained. Finally, based upon the arguments set forth in Section I of this petition, the conversations intercepted from Moreno's telephone also should be excised because they are the product of an illegal wiretap order.

After the above evidence is excised from the affidavit, the affiant is only relying upon surveillance by police officers and agents. During their surveillance, the officers and agents saw Moreno frequent the Herrick Street and Glenoaks residence.

Yet, their mere presence at these residences would not give the agents and/or officers probable cause to search either or both locations. Even if this Court were to consider the movements of the vehicles and individuals at these locations, these facts may raise suspicions about possible illegal activities. Yet, mere suspicion does not rise to level of probable cause. United States vs. Vasey,

834 F.2d at 722. Therefore, the instant search warrant failed to establish sufficient probable cause to justify the search of the aforementioned residences. Therefore, the evidence obtained from the Herrick Street residence should have been suppressed.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted, the decision of the Ninth Circuit reversed and the wiretap evidence suppressed, and this Court should remand this case to the Ninth Circuit and/or the District Court in light of the holdings by this Court.

Dated: March 3, 2003

Respectfully submitted,

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APPENDIX

OPINION OF NINTH CIRCUIT COURT OF APPEALS AFFIRMING APPELLANT'S CONVICTION 1a

OPINION OF NINTH CIRCUIT COURT OF APPEALS DENYING REQUEST FOR REHEARING AND REHEARING EN BANC 6a

FILED

JUN 05 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSE L. SALAZAR, Defendant - Appellant.	No. 01-50175 D.C. No. CR-98-01081-SVW MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOSE LUIS MORENO, aka Chompers, aka Chombi, Defendant - Appellant.	No. 01-50187 D.C. No. CR-98-01081-SVW-1

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Submitted June 3, 2002**
Pasadena, California

Before: O'SCANNLAIN, RYMER and THOMAS, Circuit Judges.

Jose Moreno and Jose Salazar appeal their convictions for narcotics trafficking. They conditionally pled guilty to conspiring to possess cocaine and marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1), and possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). We affirm.

I

The district court did not err by refusing to suppress evidence obtained through the wiretap on Moreno's phone. The affidavit requesting a wiretap provided an extensive, persuasive explanation why alternative investigative tactics were unlikely to succeed. The affidavit explained that attempts to use physical surveillance at the San Carlos, Filmore, and Gridley locations had been thwarted

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

by counter-surveillance techniques and had failed to produce information about the user of telephone #9 and pager #4. Agents did not know the identity of the user of target telephone #9 and pager #4 prior to the wiretap, so they could not rely on confidential informants or undercover agents, and the affidavit provided detailed explanations regarding the shortcomings of every available informant. While the affidavit relied on evidence obtained from prior wiretaps of other phones, the affidavit tailored its analysis to the need for a wiretap on telephone #9 and pager #4, and the affidavit provided specific reasons to suspect the user of telephone #9 of narcotics trafficking. In light of the specific, tailored discussion of the necessity justifying a wiretap on telephone #9 and pager #4, any inclusion of boilerplate language in the affidavit was immaterial. Thus, the affidavit easily met the requirements of 18 U.S.C. § 2518(1)(c), and the wiretap order accorded with Dalia v. United States, 441 U.S. 238 (1979), and United States v. Ippolito, 774 F.2d 1482 (9th Cir. 1985).

II

Nor did the district court err by refusing to suppress evidence obtained from searching the house on Herrick Avenue. Moreno and Salazar do not dispute the district court's factual finding that many of Moreno's conversations overheard by

agents discussed narcotics transactions. Other evidence also supported the search warrant: police surveillance observed suspicious traffic coming and going from the Herrick location, a consensual search of a van with Arizona plates leaving the Herrick house uncovered a smuggling compartment in which a police dog sniffed drugs, traffic leaving the Herrick house engaged in counter-surveillance tactics, the Astro van followed from the house made suspicious rendezvous, and the police concluded that the behavior and traffic patterns indicated the likelihood of narcotics trafficking. Based on the telephone conversations and observed activities of the suspects, the magistrate judge had probable cause to issue the warrants. See Illinois v. Gates, 462 U.S. 213, 238 (1983).[1]

III

Finally, the district court did not err by refusing to dismiss the indictment due to government misconduct or in failing to do so pursuant to its supervisory powers. Moreno fails to point to any evidence of misconduct that had any impact on his case. While Officer Art Barrera may have submitted a false report and a false declaration about a traffic stop of Sotero Guzman, this isolated instance of

[1]Salazar has withdrawn his challenges to evidence recovered during his arrest and the Glenoaks search warrant. As he concedes, his conditional plea agreement did not preserve these issues for appeal.

alleged misconduct did not materially impact the investigation of Moreno. While the cocaine seized from the VW searched by Barrera was cited in the affidavit seeking a search warrant for the Herrick location, ample evidence supported probable cause even if the seized cocaine is excised from the calculus. The facts do not add up to pervasive, outrageous government misconduct undermining the integrity of the investigation. See United States v. Barrera-Moreno, 951 F.2d 1089 (9th Cir. 1991).

Salazar argues that the district court erred by not allowing him to cross-examine Barrera and his partner, David Cervantes. The district court held an evidentiary hearing and concluded that none of the investigating officers had knowledge of Barrera's misrepresentations. Because there is no evidence that Barrera's misconduct affected the case against Salazar and because the search warrants were supported by probable cause independent of the seized cocaine, Salazar's concern with cross-examining Barrera and Cervantes is immaterial. AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 22 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE LUIS MORENO, aka Chompers, aka Chombi,

Defendant - Appellant.

No. 01-50187

D.C. No. CR-98-01081-SVW-1
Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN, RYMER and THOMAS, Circuit Judges

Appellant's petition for rehearing is DENIED.